St. John's Law Review

Volume 1
Number 2 *Volume 1, May 1927, Number 2*

Article 5

June 2014

Further Development of the Doctrine of Duplex v. Deering

St. John's Law Review

be insufficient to enact a statute formulated on the Massachusetts plan. The change must be even more revolutionary. The act would have to deny to a defendant the right to a bill of particulars even though under the Massachusetts law the defendant can demand it as of right. In substance it would mean that only after the highest court has decided on the law and the facts would a defendant know the crime with which he had been charged, and of which he had been found guilty. Probably no judge or student of the law would urge so radical a change.

These views therefore could not be adopted unless ancient tradition were completely repudiated. It would lead to the conclusion that it would be wiser to proceed on the premise that every man who is indicted is guilty of the charges set forth in the indictment, and then to effectuate this theory, adopt the wisdom of the Queen in Alice of Wonderland,—we will have the execution first and the judgment afterward.

W. E.

FURTHER DEVELOPMENT OF THE DOCTRINE OF DUPLEX *v.* DEERING. —On the 11th of April, 1927, the Supreme Court of the United States handed down the decision in the Bedford Cut Stone Co. *v.* Journeymen Stone Cutters Association of North America.[1] In a sense the decision is only a reiteration of the propositions previously announced by the court in Duplex *v.* Deering.[2] The fact, however, that the doctrine of the Duplex case has been thus reiterated and even extended by the Supreme Court has led a great many sympathizers with the aims and methods of labor unions to pause and reconsider the situation with regard to the effectiveness of the organization of labor engaged in interstate commerce. These decisions, in both of which, there were strong and well reasoned dissenting opinions, have led many men to the conclusion that strikes in interstate commerce are now practically illegal, will be enjoined by the courts and that unless legislative relief is forthcoming from Congress, the organization of labor in interstate commerce is practically without value.

The development of the doctrine of the Duplex case is extremely interesting. The old views of the court as expressed in the Debs case[3] and the Danbury Hatters case[4] had been dealt with by statute of

---

[1] U. S. Sup. Ct. Oct. T. 1926, No. 412, 71 L. Ed. 581 (1927).

[2] 254 U. S 443 (1921).

[3] Re Debs, 158 U. S. 564 (1895).

[4] Lowe *v.* Lawlor, 208 U. S. 274 (1908), Lawlor *v.* Lowe, 235 U. S. 522 (1915).

Congress in the Clayton Act and the Duplex case brought for review to the court Sec. 6 and Sec. 20 of the Clayton Act.[5]

It will perhaps be best to consider the Duplex case with some degree of care. The facts were these:

There were in the entire country four companies engaged in the manufacture of printing presses. Of these, three companies had recognized the union and entered into agreements under which they were operating. The Duplex Co., which was the fourth company, refused to sign an agreement with the union or in any way to deal with it and since most of the employees of the Duplex Co. were non-union members, a strike which was called in the Duplex Co. resulted only in the withdrawal of eleven men. Under these conditions, the other three manufacturers served notice upon the union that unless the Duplex Co. would unionize its plant, they would be compelled to abrogate the contracts. The union thereupon issued a general order which forbade its members from installing any printing presses made by the Duplex Co.; from doing any work thereon and they made efforts to prevent the transportation by the moving companies of any of the printing presses of the Duplex Co.; they also attempted to prevent the supply of parts and they also attempted to prevent the repair or installation of the printing presses made by the Duplex Co. It was claimed by the Duplex Co. that this activity on the part of the union constituted a conspiracy within the provisions of the Sherman Anti-Trust Law and that it should be enjoined by the Supreme Court. Both the District Court and the Circuit Court dismissed the bill and the case was brought to bar of the highest tribunal by a writ of certiorari.

The majority of the court was of the opinion that the acts alleged constituted a conspiracy and that neither Section 6 nor Section 20 of the Clayton Act prevented the issuance of the injunction. Section 6 of the Clayton Act provided in effect that the labor of human beings is not a commodity or an object of commerce and Section 20 provided that during the course of a dispute between employer and employee, no injunction should be issued to restrain the union or to restrain any individual employee from terminating his employment and from ceasing to perform any work or from recommending, advising, persuading, stop by peaceful means so to do or from peacefully persuading any person to work or abstain from work or to believe in withholding the strike benefits and to peacefully assemble at places where it is lawful to be and to do or refrain from doing any act

[5] Chap. 323, 38 Stat. at L. 730, 737 U. S. C. title, 15 § 26 (Oct. 15, 1914).

which would be lawful if no dispute were taking place. The Supreme Court, however, held that there is a fundamental distinction between a primary and secondary boycott;[6] that the act pertained to a primary boycott and had no application to a secondary boycott and that the specific acts charged against the union could be enjoined. In a very powerful dissent, Mr. Justice Brandeis points out that the reasonableness of the acts done by the union or committed by the union or its members are the only basis upon which the decision of the court could go. Analyzing it from the point of view of legal dialectic, the following questions presented themselves:

1. Were these acts conspiracy at common law?[7]
2. What was the effect of Sections 6 and 20 of the Clayton Act?

It has been held for a long time at common law that any strike was a conspiracy which would be enjoined by equity. The realization that self interest of a labor union justifies a strike did not come as a result of legislative but of judicial enactment. It did not come as a result of the rejection of one principle by the court and the acceptance of another but it came as a result of the better understanding of industrial conditions. Courts began to hold that self interest justified a strike. Originally, it was held by some courts that only a strike for better hours and wages was justifiable.[8] Other courts, however, with a better understanding and a clearer perception of industrial conditions allowed strikes for the purpose of unionizing.[9] A further division between courts took place upon the question of whether refusal to work on material by members of the union no matter whether such material was in the control of the member or elsewhere and some courts held that such refusal was conspiracy.[10] But still other courts who realized what the situation was more thoroughly, held that such a right existed.[11]

---

[6] Supra, note 2 p. 466.

[7] "The conclusion was reached that the complainant was entitled to an injunction under the Sherman Act as amended by the Clayton Act, and that it was unnecessary to consider whether a like result would follow under the common law or local statutes." Bedford Stone Co. *v.* Journeymen Stone Cutters Asso., supra, note 1, 586.

[8] Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 (1900), Linke *v.* Clothing Cutters, 77 N. Y. 396, 26 Atl. 505 (1893); United States *v.* Haggerty, 116 Fed. 510 (C. C. W. Va. 1897); Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 (1903).

[9] National *v.* Cummings, 170 N. Y. 315, 63 N. E. 368 (1902).

[10] Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841 (1914); Purvis *v.* United Brotherhood, 214 Pa. 348, 63 Atl. 585 (1906); Booth *v.* Bugess 72 N. J. Eq. 181, 65 Atl. 226 (1906).

[11] Bossert *v.* Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Cohn *v.* Bricklayers Union, 92 Conn. 161, 101 Atl. 659 (1917); Gill *v.* Doerr, 214

The recognition by the state courts that the refusal of members of the union to work upon material made in a non-union factory or made by men working in opposition to the members of the union, removed the last common law obstacle to the proper organization of labor unions for the purpose of achieving union aims. There was therefore no common law objection to the practices sought to be enjoined in the Duplex case. It has also been held under the Sherman Law that any act of conspiracy must be an unreasonable act before it could be enjoined by a Federal court under these laws.[12] Further, it is important to distinguish between this case and such cases where the questions put to issue were not the reasonableness of the restraint but whether the restraint was of interstate commerce.[13] Nevertheless,

---

Fed. 111 (D. C. S. D. N. Y. 1914); State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904).

[12] Standard Oil Co. *v.* U. S. 221 U. S. 1 (1911); United States *v.* American Tobacco Co., 221 U. S. 106 (1911); Board of Trade *v.* United States, 246 U. S. 231 (1918); United States *v.* Trenton Potteries, 71 L. Ed. (U. S.) 404 (1927). Compare United States *v.* Terminal R. Asso. 224 U. S. 383 (1912); United States *v.* Reading Co. 226 U. S. 324 (1912). In the Duplex case, p. 468 the court per Pitney, J. "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associate which possibly they might have been at liberty to pursue in absence of the statute."

[13] Anderson *v.* United States, 171 U. S. 604 (1898), in which an agreement between the members of an unincorporated association, banded together with the object of promoting business conveniences, the court held that the rules were evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and that for such purpose they are reasonable and fair, and that they can possibly affect interstate trade or in but a remote way, and are not void as violations of the act of Congress. But compare, Swift and Company *v.* United States, 196 U. S. 375, 396 (1905) the Anti-Trust Act "directs itself against that dangerous probability as well as the completed result." See also Montague & Co. *v.* Lowry, 193 U. S. 38, 47, 48 (1904) where the Anderson case is distinguished.

In Lowe *v.* Lawlor, 208 U. S. 274 (1908), a combination of labor organizations and the members thereof, to compel a manufacturer whose goods are sold almost entirely in other states, to unionize his shops and on his refusal to so do to boycott his goods and thus prevent their sale in States other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce and within the meaning of the Anti-Trust Act. The court holding, when tre case arose again, 235 U. S. 522 (1915), that irrespective of compulsion or even agreement to observe its intimation, the circulation of a "we don't patronize" or "unfair" list manifestly intended to put a ban upon those

the Supreme Court in the Duplex case issued the injunction and restrained the acts enumerated above. It was ably pointed out in the

---

whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Anti-Trust Act, if it is amended to restrain and does restrain interstate commerce.

In United Mine Workers *v.* Coronado Co., 259 U. S. 344 (1922), 263 U. S. 295 (1925), where the constitution of a general association of workmen, organized for the declared purpose of improving their wages and working conditions through strikes and other means, and subdivided into district and local unions, ordered local strikes within respective districts, it was held that the mere reduction in the supply of an article to be shipped in interstate commerce by tortious prevention of its production is ordinarily an indirect and remote obstruction to that commerce; but when the extent of those unlawfully preventing the production is to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act. Accord: United Leather Workers *v.* Herkert, 265 U. S. 457 (1924); Industrial Association *v.* United States, 268 U. S. 64 (1925); United States *v.* Brims, 272 U. S. 549 (1926) wherein an agreement between manufacturers of mill-work, building contractors, and union carpenters, to check competition from non-union made mill-work coming from other states, to accomplish which the manufacturers and contractors were to employ only union carpenters, who would refuse to install the non-union millwork, is a violation of the Anti-Trust Act. Standard Oil Co. *v.* United States, 221 U. S. 1 (1911), where the court held that a combination which creates a monopoly is an unreasonable and undue restraint of trade (in this case petroleum) and its products moving in interstate commerce, and falls within the prohibition of the Anti-Trust Act. Accord: United States *v.* American Tobacco Co., 221 U. S. 106 (1911). In this case the monopoly involved the tobacco industry. Chicago Board of Trade *v.* United States, 246 U. S. 231, 238 (1918), the court per Brandeis J., "The cases rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices by which they would buy or sell during an important part of the business day, is an illegal restraint upon trade under the Anti-Trust Act. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition.* * * The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. * * *" But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Act. In the United States *v.* Trenton Potteries Co., 71 L. Ed. (U. S.) 404, 406 (1927), the court per Stone, J., "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint is controlled by the recognized purpose of the Sherman Law itself." See also, United States *v.* St. Louis Terminal, 224 U. S. 383 (1912); United States *v.* Reading Co., 226 U. S. 324, 370

dissent that the decision rested on no common law or statutory ground.[14]

With this heritage of legal decision, the court approached the problem in the Bedford Cut Stone Co. case and reviewed the following facts:

The Journeymen Stone Cutters Association is a national association having about 5,000 members, divided into a number of locals. The plaintiffs for a number of years worked under agreements with the general union. Because of certain demands of the union, these agreements failed to be renewed and the plaintiffs organized a union of their own. The general union had a constitutional provision as follows: No member of this association shall cut, carve or fit any material that has been cut by men working in opposition to the association. It was the enforcement of this provision that was sought to be restrained in the Bedford case. It will be noticed at the outset that the acts complained of in this case differ considerably from the Duplex case. In the first place, no active propaganda on the part of the union was complained of,. no solicitation of sympathetic strikers and no attempt to interfere with the business of the plaintiffs was anywhere suggested. All that the members of the union did was to refrain from working upon material made by men working in opposition to the union. This the members of the union were under a contract to do by virtue of their constitution and this as we have shown above the common law in New York any way, when the case arose, had recognized as a right which the members of this union enjoyed. The construction given to the Clayton Act in the Duplex case, of course removed the prohibition against the injunction which that statute sought to impose and the only question left for the court to decide was whether the Duplex case should be extended to cover this case. Justices Brandeis and Holmes who have dissented in the Bedford case did not say that they thought it was necessary for the Duplex case to be reversed, but of course any broad interpretation will have to recognize that if the Duplex case was law, the Bedford case was a logic extension and Mr. Justice Stone[15] who wrote a separate concurring opinion did say that as a new question he should agree with the minority but that he felt bound by the Duplex case.

(1912), the court per Lurton, J., "Where a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method used."

[14] Duplex Co. *v.* Deering, supra note 2, 479.

[15] Supra, note 1, 588.

This adherence to precedent in a matter of such vast public importance differs from the court's practices in constitutional matters where precedents have only been given such force as the expediency of the time dmanded. That the same court which permitted the United States Steel Corporation,[16] a capitalistic organization, to control more than 50% of the trade and which permitted in the United States Shoe machinery case,[17] a capitalistic organization to control nearly all of the industry to be organized should find the refusal to work of the Journeymen in the Bedford case an unreasonable conspiracy in violation of the Sherman Law seems to import a disbelief in the soundness of labor organization rather than a strict adherence to any technical rules of law.

M. H.

DOWER IN EQUITABLE ESTATES—The broad principle that a widow shall have a right to a life interest in one third of all the estates of inheritance of which her husband was seized during coverture was recognized in the Magna Carta.[1] However, at common law, dower attached only to legal estates of inheritance and was not recognized in equitable estates. This doctrine was definitely laid down in the case of Radnor *v.* Vandebendy.[2] Here the court was faced with the principle that equity follows the law, but refused to allow the wife dower in real property of which her husband had an equitable estate. This, even although two years prior, curtesy had been allowed to a husband in the trust estates of his wife.[3] This rule was subsequently severely criticized time and again,[4] but nevertheless was reluctantly

---

[16] United States *v.* United Steel Corporation, 251 U. S. 417 (1920).

[17] United States *v.* United Shoe Machinery Co., 247 U. S. 32 (1918).

[1] McKechnie, Magna Carta (2nd Ed. 1914) 215.

[2] 16 Lords Jour. 159 (1697) where the court said: "'Tis nothing but Precedent that consecrates Half the decrees in Equity. And no man shall say, that ever any Woman was endowed in equity of a trust estate. * * * So that Equity doth not exceed the Rules of Law in advancing the Right of Dower. 'Tis true, unless Fraud be the case, Relief in Equity shall not be given against a legal title to dower."

Prior to the Radnor case the decisions were in conflict. Colt *v.* Colt, 1 Ch. Rep. 254 (1664) dismissing a bill in chancery for dower in a trust estate. Contra, Fletcher *v.* Robinson (1653), quoted from Register's book in Banks *v.* Sutton, 2 Wms. (Piere). 700, 710-712 (1732).

[3] Snell *v.* Clay, 2 Vern. 324 (1695). And thus the doctrine became settled that a husband shall have curtesy in a trust estate, but the widow shall not have dower.

[4] Chaplin *v.* Chaplin, 3 Wms. (Piere) 229 (1733); Burgess *v.* Wheate, 1 Wm. Bl. 123 (1759) per Lord C. J. Mansfield, ". . . it has been declared